A

PP v. ZOLZAYA NATSAGROJ

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
AHMADI ASNAWI JCA
ZAMANI A RAHIM JCA
B [CRIMINAL APPEAL NO: B-05-145-06-2014]
21 MAY 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 278.6g of heroin and 85.0g monoacetylmorphines – Drugs found hidden in*
C *separate bags – Whether trial judge correctly invoked presumption of trafficking based on weight of drugs – Whether accused had knowledge of drugs – Defence of ignorance – Whether presumption of trafficking rebutted – Whether trial judge erred in acquitting and discharging accused*

CRIMINAL PROCEDURE: *Appeal – Appeal by prosecution – Trafficking in*
D *278.6g of heroin and 85.0g monoacetylmorphines – Drugs found hidden in separate bags – Whether trial judge correctly invoked presumption of trafficking based on weight of drugs – Whether accused had knowledge of drugs – Defence of ignorance – Whether presumption of trafficking rebutted – Whether trial judge erred in acquitting and discharging accused*

E

EVIDENCE: *Statement – Cautioned statement – Inconsistency between cautioned statement and oral testimony – Whether inadequately considered by trial judge – Whether trial judge erred in accepting accused oral testimony*

On 26 January 2013, PW4 led a police party to conduct a raid on a double
F storey house at Subang Jaya. In a room at the upper floor of the house, PW4 saw two persons, a female ('the respondent') and a male ('the second accused'). Upon checking the room, PW4 found what he suspected to be heroin in a bag bearing the brand name 'Lacoste' ('exh. P67') found inside another bag bearing the brand name 'One Polar' ('exh. P13'). The
G respondent, the second accused and the exhibits were taken to the police headquarters by PW4 and handed over to the investigating officer ('PW3'). Subsequently, the respondent was charged together with the second accused for trafficking in 278.6g heroin and 85.0g monoacetylmorphines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and
H punishable under s. 39B(2) of the same Act read together with s. 34 of the Penal Code. The trial judge found that the prosecution had failed to prove a *prima facie* case against the second accused and therefore, acquitted and discharged the second accused without calling for his defence. However, the trial judge, based on the substantial amount of drug, invoked the presumption of trafficking under s. 37(da) of the Act against the respondent and called for
I her defence. During defence, the respondent contended, *inter alia,* that she got to know one Khaliun, a Mongolian lady whom had given her exh. P67 and

asked her to keep it for a few days. The respondent further explained that she had put exh. P67 into exh. P13 to clear up the room upon learning that her boyfriend was coming and not to hide from the police. According to the respondent, she did not know the contents of exh. P67 and did not open to see what was inside because she assumed that exh. P67 contained clothes. At the end of the defence case, the trial judge found that the respondent's defence had raised a reasonable doubt on the ingredient of possession and acquitted and discharged the respondent. Hence, the present appeal by the prosecution. During appeal, the Deputy Public Prosecutor ('DPP') raised the issue of knowledge and submitted that the trial judge had failed to address his mind to the inconsistency between the respondent's cautioned statement and her oral testimony. The DPP argued that in the cautioned statement the respondent had stated that she had put exh. P67, which contained the drugs, into exh. P13 when she heard the knocking on the door. In her oral testimony, the respondent said that had put the exh. P67 into exh. P13 because she wanted to clean up her room since the second accused was coming. The DPP submitted that the respondent's attempt at changing her cautioned statement had decreased the evidentiary value of the statement. Further, in cross-examination PW3 had stated that no particulars of Khaliun was given by the respondent in her cautioned statement. In addition to that the DPP also submitted that the respondent was guilty of wilful blindness because exh. P67 was not sealed and the respondent could have opened it to check the contents, but she chose not do to so.

Held (allowing appeal; setting aside decision of the High Court; respondent convicted and sentenced to death)
Per Aziah Ali JCA delivering the judgment of the court:

(1) The prosecution's evidence showed that the bag containing the drugs was found inside the respondent's bag concealed from view, the respondent was the sole tenant of the room and nobody else had the key to the room. Therefore at the material time the respondent had actual possession, custody and control of the exh. P67. The respondent had admitted putting the drugs in her bag. The concealment of the bag supported the inference of knowledge of the contents of the bag. Based on the quantity and weight of the drugs, the trial judge had rightly invoked the presumption under s. 37(da) of the Act. Therefore, the trial judge had correctly ordered the respondent to enter her defence. (paras 21)

(2) There was an apparent inconsistency between the respondent's cautioned statement and oral testimony regarding her explanation as to when she put the exh. P67 inside exh. P13. The respondent's cautioned statement was recorded approximately three days after her arrest. Given the proximity of time between the date of arrest and the date when the cautioned statement was recorded, and the fact that the answers in the

A cautioned statement were typed by the respondent herself, it would be reasonable to expect that the respondent's recollection of events on 26 January 2013 as recorded in her cautioned statement would still be fresh in her mind. (paras 23 & 25)

B **(3)** The trial judge had failed to properly address his mind to the probability that what the respondent had stated in her cautioned statement may be a true reflection of events that had occurred on 26 January 2013 and, that the explanation given by the respondent in her testimony was probably an afterthought to suit her defence of no knowledge. Had the trial judge properly address his mind to this issue, the trial judge would C have entertained reservations about the credibility of the respondent's oral explanation. The events as narrated by the respondent in her cautioned statement ought to be preferred compared to her oral explanation. Therefore, the trial judge had erred in accepting the respondent's oral explanation. (para 26)

D **(4)** It was improbable that the respondent could not have known that exh. P67 may not contain clothes during the time when exh. P67 was in her possession. A reasonable person's suspicions would have been aroused that exh. P67 may not contain clothes. It was mere folly on the respondent's part not to examine exh. P67. Ignorance is a defence when E there is no reason for suspicion and no right and opportunity of examination, and ignorance *impliciter* is not enough. Therefore, the respondent is guilty of wilful blindness. (para 32)

(5) Notwithstanding the allegations made in respect of Khaliun, and even if Khaliun was involved in drug related activities, this did not in any way F detract from the fact that the respondent had actual possession, custody and control over the drugs at the time of her arrest. The quantity of drugs triggered the presumption of trafficking under s. 37(da) of the Act. On a totality of the evidence, the respondent had failed to raise a reasonable doubt on the prosecution's case and had also failed to rebut, on a balance G of probabilities, the presumption of trafficking under s. 37(da) of the Act. The balance of evidence was against the acquittal of the respondent. (paras 34 & 35)

Bahasa Malaysia *Translation Of Headnotes*

H Pada 26 Januari 2013, PW4 telah mengetuai sepasukan polis untuk menjalankan serbuan ke atas sebuah rumah dua tingkat di Subang Jaya. Di dalam sebuah bilik di tingkat atas rumah rumah tersebut, PW4 melihat dua orang, seorang perempuan ('responden') dan seorang lelaki ('tertuduh kedua'). Setelah memeriksa bilik tersebut, PW4 telah mendapati apa yang I disyaki sebagai heroin di dalam beg berjenama 'Lacoste' ('eks. P67') yang dijumpai di dalam satu lagi beg yang berjenama 'One Polar' ('eks. P13'). Responden, tertuduh kedua dan eksibit-eksibit tersebut telah dibawa ke ibu pejabat polis oleh PW4 dan diserahkan kepada pegawai penyiasat ('PW3').

Kemudiannya, responden telah dipertuduh secara bersesama dengan tertuduh kedua kerana mengedar 278.6g heroin dan 85.0g monoacetylmorphines, suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dan boleh dihukum di bawah s. 39B(2) Akta yang sama dibaca bersama-sama dengan s. 34 Kanun Keseksaan. Hakim bicara telah membuat dapatan bahawa pihak pendakwaan telah gagal membuktikan kes *prima facie* terhadap tertuduh kedua dan oleh itu, melepaskan dan membebaskan tertuduh kedua tanpa memanggil pembelaannya. Walau bagaimanapun, hakim bicara, berdasarkan kuantiti dadah yang banyak, telah mengguna pakai anggapan pengedaran di bawah s. 37(da) Akta terhadap responden dan memanggilnya untuk membela diri. Dalam pembelaannya, responden menghujahkan antara lain, bahawa dia telah mengenali seorang yang bernama Khaliun, seorang wanita Mongolia yang telah memberikan eks. P67 kepadanya dan memintanya untuk menyimpan eks. P67 buat beberapa hari. Responden selanjutnya menjelaskan bahawa dia telah meletakkan eks. P67 ke dalam eks. P13 untuk membersihkan biliknya selepas mengetahui bahawa teman lelakinya akan datang dan bukan untuk bersembunyi dari pihak polis. Menurut responden, dia tidak tahu kandungan eks. P67 dan tidak membukanya untuk melihat apa yang berada di dalamnya kerana menganggap bahawa eks. P67 mengandungi pakaian. Pada akhir kes pembelaan, hakim bicara telah membuat dapatan bahawa pembelaan responden telah menimbulkan keraguan yang munasabah terhadap unsur pemilikan dan melepaskan dan membebaskan responden. Oleh itu rayuan ini dari pihak pendakwaan. Dalam rayuannya, Timbalan Pendakwa Raya ('TPR') membangkitkan isu pengetahuan dan menghujahkan bahawa hakim bicara gagal mempertimbangkan percanggahan antara kenyataan beramaran responden dan keterangan lisannya. TPR menghujahkan bahawa dalam kenyataan beramaran, responden telah menyatakan bahawa dia telah meletakkan eks. P67 yang mengandungi dadah di dalam eks. P13 apabila mendengar bunyi ketukan pintu. Dalam keterangan lisannya responden berkata bahawa dia telah meletakkan eks. P67 ke dalam eks. P13 kerana dia hendak membersihkan biliknya kerana kedua tertuduh akan datang. TPR menghujahkan bahawa percubaan responden untuk mengubah kenyataan beramarannya telah mengurangkan nilai keterangan dalam kenyataan tersebut. Selanjutnya, dalam pemeriksaan balas, PW3 telah menyatakan bahawa tiada sebarang butiran Khaliun yang diberikan oleh responden dalam kenyataan beramarannya. Selain itu, TPR menghujahkan lagi bahawa responden bersalah atas kebutaan sengaja kerana eks. P67 tidak dikunci dan responden boleh membukanya untuk memeriksa kandungannya, tetapi dia memilih untuk tidak melakukan sedemikian.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi; responden disabitkan dan dijatuhkan hukuman mati)
Oleh Aziah Ali JCA menyampaikan penghakiman mahkamah:

(1) Keterangan pendakwaan menunjukkan bahawa beg yang mengandungi dadah ditemui di dalam beg responden telah disembunyikan daripada dikesan, responden merupakan penyewa tunggal bilik tersebut dan tiada

A siapa lagi yang mempunyai kunci bilik tersebut. Oleh itu pada masa material responden mempunyai milikan sebenar, jagaan dan kawalan eks. P67. Responden telah mengaku meletakkan dadah tersebut ke dalam begnya. Penyembunyian beg menyokong inferen pengetahuan isi kandungan beg tersebut. Berdasarkan kuantiti dan berat dadah, hakim
B bicara telah mengguna pakai anggapan di bawah s. 37(da) Akta dengan betul. Oleh itu, hakim bicara telah dengan betulnya mengarahkan responden untuk membela diri.

(2) Terdapat percanggahan ketara antara kenyataan beramaran responden dan keterangan lisannya mengenai penjelasan bila dia meletakkan eks.
C P67 di dalam eks. P13. Kenyataan beramaran responden direkodkan kira-kira tiga hari selepas dia ditangkap. Memandangkan kedekatan masa antara tarikh tangkap dan tarikh apabila kenyataan beramaran direkodkan, dan fakta bahawa semua jawapan dalam kenyataan beramaran telah ditaip oleh responden sendiri, adalah munasabah untuk
D mengharapkan bahawa ingatan responden mengenai imbasannya terhadap kejadian pada 26 Januari 2013 seperti yang direkodkan dalam kenyataan beramarannya masih lagi segar di fikirannya.

(3) Hakim bicara telah gagal mempertimbangkan kebarangkalian bahawa apa yang responden nyatakan dalam kenyataan beramarannya mungkin
E gambaran yang tepat mengenai peristiwa yang telah berlaku pada 26 Januari 2013 dan, bahawa penjelasan yang diberikan dalam testimoni responden mungkin sesuatu yang difikirkan kemudian untuk disesuaikan dengan pembelaan tiada pengetahuan. Jika hakim bicara mempertimbangkan isu ini, hakim bicara pastinya akan mempunyai
F keraguan tentang kredibiliti penjelasan lisan responden. Peristiwa-peristiwa yang dinyatakan oleh responden dalam kenyataan beramarannya patut diutamakan berbanding dengan penjelasan lisannya. Oleh itu, hakim bicara telah terkhilaf dalam menerima penjelasan lisan responden.

G **(4)** Adalah mustahil bahawa responden tidak tahu bahawa eks. P67 berkemungkinan tidak mengandungi pakaian apabila eks. P67 berada dalam miliknya. Kesangsian seseorang yang munasabah pastinya telah dibangkitkan bahawa eks. P67 tidak mungkin mengandungi pakaian. Adalah perbuatan tidak bijaksana untuk tidak memeriksa eks. P67.
H Kejahilan adalah pembelaan apabila tiada sebab untuk syak dan tiada hak dan peluang untuk menjalankan pemeriksaan, dan kejahilan *impliciter* adalah tidak mencukupi. Oleh itu, responden bersalah kebutaan sengaja.

(5) Walaupun dakwaan yang dibuat berkenaan dengan Khaliun, dan jika
I Khaliun terlibat dalam aktiviti berkaitan dadah, ini tidak dalam apa jua cara memesongkan fakta bahawa responden mempunyai milikan

sebenar, jagaan dan kawalan ke atas dadah tersebut sewaktu tangkapan dibuat. Kuantiti dadah mencetuskan anggapan pengedaran di bawah s. 37(da) Akta. Pada keseluruhan keterangan, responden gagal menimbulkan keraguan munasabah terhadap kes pendakwaan dan juga telah gagal mematahkan, atas imbangan kebarangkalian, anggapan pengedaran di bawah s. 37(da) Akta. Keseimbangan keterangan bertentangan dengan pelepasan responden.

Case(s) referred to:
Hoh Bon Tong v. PP [2010] 5 CLJ 240 CA ***(refd)***
Kumaran Sappani v. PP [2011] 3 CLJ 251 FC ***(refd)***
Ubaka v. PP [1995] 1 SLR 267 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a), (2)
Penal Code, s. 34

For the prosecution - Muhamad Yasser Mohd Nasri; DPP
For the respondent - LA Gomes; The Law Offices of LA Gomes, Meor Shaazizi & Assocs

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-152-08-2013]

Reported by Sandra Gabriel

JUDGMENT

Aziah Ali JCA:

Introduction

[1] The respondent, Zolzaya Natsagroj, a Mongolian national, was charged together with one Barsbaatar Ganbold, who is also a Mongolian national, with having a common intention of trafficking in dangerous drugs. The charge against them reads:

> That you in pursuance of a common intention on 26th January 2013, at about 0130 am, at No. 71, Jalan SS 15/20 Subang Jaya, in the district of Petaling, in the state of Selangor, did traffic in a dangerous drugs, to wit 278.6 grams Heroin and 85.0 grams Monoacetylmorphines and thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under Section 39B(2) of the same Act read together with section 34 of the Penal Code.

The Prosecution's Case

[2] On 26 January 2013 at about 1.30am, Inspector Ihwan Hilmi bin Ismail (PW4) led a police party consisting of seven police personnel to conduct a raid on a double storey house at No. 71, Jalan SS 15/20 Subang Jaya. The raid was conducted pursuant to information received about drug related activities involving Mongolians at the said address.

[3] PW4 managed to gain entry into the house by unlocking the main wooden door through a window next to the main door. There were five rooms on the ground floor and four rooms on the upper floor all occupied by tenants. PW4 checked all the rooms. At the last room on the upper floor, PW4 knocked on the door, and when there was no response after the third time, PW4 kicked the door open.

[4] Upon entering the room PW4 saw two persons, a male (identified as the second accused) and a female (identified as the respondent).

[5] PW4 checked the room and seized a number of items. Among the items seized by PW4 that are relevant to the charge against the respondent were the following:

(a) a red and white coloured luggage bag bearing the brand name 'One Polar' which was placed on top of another bag which PW4 found in a corner of the room;

(b) inside this 'One Polar' bag was a white paper bag bearing the brand name 'Lacoste';

(c) inside the 'Lacoste' bag was a white plastic bag bearing the brand name 'C&E';

(d) inside the 'C&E' bag was a transparent plastic bag, and

(e) inside the transparent plastic bag was another transparent plastic bag containing what PW4 suspected to be heroin.

[6] PW4 marked these exhibits as follows:

(a) 'A1' - the red and white coloured luggage bag bearing the brand name 'One Polar';

(b) 'A2' - the white paper bag bearing the brand name 'Lacoste' found inside the luggage bag marked as 'A1';

(c) 'A3' - the transparent plastic bag bearing the brand name 'C&E' found inside the bag marked as 'A2';

(j) 'A4' - the transparent plastic bag found inside the bag marked as 'A3';

(k) 'A5' - the transparent plastic bag containing what PW4 suspected to be heroin found inside the bag marked as 'A4'.

[7] PW4 then took both the respondent and the second accused together with the exhibits seized to the Subang Jaya district police headquarters. PW4 prepared a search list (exh. P3) and he handed both the accused persons and the exhibits to the investigating officer ("I.O") Inspector Rozlia bt Rozali (PW3) who acknowledged receipt (exh. P4).

[8] PW3 marked the exhibits received from PW4 as follows:

(a) 'A1' as 'R1' (tendered as exh. P13);

(b) 'A2' as 'R2' (tendered as exh. P67);

(c) 'A3' as 'R3' (tendered as exh. P68);

(d) 'A4' as 'R4' (tendered as exh. P69); and

(e) 'A5' as 'R5' (tendered as exh. P70).

[9] Apart from these markings, PW3 had also put her signature and date on the exhibits. These exhibits were kept in a locked steel cupboard in her room. Only she had the key and access to the cupboard. On 5 February 2013, PW3 handed the drug exhibits packed in a box that she had marked as 'RO' to the chemist, Norhaya binti Jaafar (PW1) for analysis (exh. P8). PW1 issued an acknowledgment receipt (exh. P9).

[10] PW1 issued a report in which she confirmed that the drug exhibits contained 278.6g heroin and 85g monoacetylmorphines (exh. P10).

[11] Investigations revealed that both the respondent and the second accused were students. PW3 confirmed that the second accused did not have a key to the respondent's room.

[12] The defence tendered through PW3 the respondent's cautioned statement which was recorded on 29 February 2013 (exh. D76). In the cautioned statement the respondent stated amongst others as follows:

> ... Then, suddenly someone knocked the door and I was shock and afraid. They broken my door and came into my home. I put Khaliun's items inside my red bag. The police just keep check my home and found that it was drug. My boyfriend and me both of us shocked lot and we didn't know about that.

Findings Of The Trial Judge

[13] The trial judge accepted the testimony of both PW3 and PW4 relating to the raid and arrest of the respondent and the recovery of the drug exhibits. In finding that the prosecution has established a *prima facie* case against the respondent, His Lordship said as follows:

> The facts which could be gleaned from the evidence of SP3 and SP4 was that the room from which the drugs [sic] was rented by the 1st accused. Further the bag from which the package of drug was found belonged to the 1st accused alone. The 2nd accused was merely a weekend visitor to the room to spend time with the 1st accused who was his girlfriend.
>
> It was established that the 2nd accused lived elsewhere and nothing incriminating was found there. The cautioned statement of the 1st accused tendered by the defence counsel showed that the 2nd accused had no knowledge of the drugs found in the bag.

A From the cautioned statement of the 1st accused it could be also determined that at the material time the plastic bag in which the drug package was found was under her custody and control. The 1st accused stated that the plastic bag was given to her by a person called Khailun.

Custody or control is insufficient to prove possession as the mental
B element of knowledge is necessary. In this case I inferred knowledge against the 1st accused taking into account her own statement that indicated that she had placed the plastic bag in her bag when the police came. To me her conduct showed that she took steps to hide the plastic bag.

Apart from possession the amount of drug was substantial to indicate
C trafficking and in this case the prosecution could rely on the presumption of trafficking under section 37(da) of the Dangerous Drugs Act 1952.

There was sufficient and prima facie evidence against the 1st accused and I therefore called for her defence.

[14] With respect to the second accused, the trial judge found that the
D prosecution had failed to link the second accused to the drugs found and therefore was unable to prove a *prima facie* case against the second accused. The second accused was acquitted and discharged without calling for his defence. No appeal was lodged against the acquittal and discharge of the second accused.

E **The defence**

[15] Essentially, the respondent's defence was that she had no knowledge of the drugs. Her evidence may be summarised as follows:

(a) the respondent got to know one Mongolian lady by the name of Khaliun
F through her other friends from Mongolia approximately eight months prior to the incident;

(b) she had rented the room in which the drugs were recovered since February 2011;

G (c) all her expenses in Malaysia were paid for by her father. Her parents work as engineers;

(d) Khaliun had visited her room twice and her boyfriend, the second accused would come during weekends;

(e) she had known the second accused for about one month;

H

(f) on 24 January 2013 at about 11am to 12 noon, Khaliun had called her and asked her to come down as Khaliun was waiting for her;

(g) she went downstairs to meet Khaliun who had come by taxi;

I (h) Khaliun gave her the 'Lacoste' bag (exh. P67) and asked her to keep it for a few days and she would come to collect it later;

(i) she asked Khaliun what was inside the bag but Khaliun was in a hurry and said she would tell her later;

(j) the respondent assumed that the bag contained clothes because on two previous occasions Khaliun had asked the respondent to keep her clothes because Khaliun's boyfriend will get angry when Khaliun buys too many clothes;

(k) the respondent did not open the bag to see what was inside because the bag did not belong to her and she felt it was impolite to open the bag;

(l) inside her room she placed exh. P67 on top of her bag (exh. P13);

(m) at about 2pm the second accused called her to tell her that he was coming and would be arriving in 20 minutes;

(n) she hurriedly cleaned her room and put the bag exh. P67 into the bag exh. P13;

(o) she then went out to have lunch with the second accused and after that both went back to her room and they did not leave the room until she left for her class the next morning. She returned to her room at about 11am;

(p) at about 3pm, Khaliun called her to tell her that she was hungry. Since the respondent was cooking Mongolian food, she packed some for Khaliun who came by to pick up the food and left;

(q) later at about 9pm Khaliun called her. Since the respondent was cooking, Khaliun came to her room for dinner;

(r) after dinner, at about 10pm she and the second accused sent Khaliun to the taxi station. Then she and the second accused returned to her room;

(s) at about 1am while she and the second accused were watching movies in the room, there was a knock on the door;

(t) she asked who it was and the answer was "I am your friend" and when she asked who, the answer was "I am Jeff". Before she could answer, the door was kicked open. She remained on the bed;

(u) the police searched her room and found the bag exh. P67 inside the bag exh. P13;

(v) the police opened the bag exh. P67 but the respondent said she did not know what was inside this bag;

(w) the police then handcuffed her and the second accused and they were taken in separate cars to the second accused's apartment in Sri Petaling; and

(x) from Sri Petaling they were taken to the police station.

A **Findings Of The Trial Judge**

[16] At the end of the defence case, the trial judge found that the defence had raised a reasonable doubt on the ingredient of possession. This is what the trial judge said:

B > At the end of the prosecution's case I inferred the guilty conduct of the 1st accused from the fact that she had placed the plastic bag in her bag on learning of the police at her door. I accepted her explanation in defence that she had placed the plastic bag in her bag not to hide from the police but to clear up the room on learning that her boyfriend was coming to her room.

C **[17]** Further, the trial judge considered the evidence adduced by the defence and found that the respondent was an outstanding student, she had performed consistently well in her studies, she came from a reputable family, there was no indication that she had financial difficulties, she was active in cultural activities and she had planned her future. Therefore, the trial judge D was of the view that the respondent would not jeopardise her future and do something foolish like selling drugs. The trial judge stated that "I sensed a ring of truth in her testimony that she was unaware of the drugs in the plastic bag". According to the trial judge, it is safer to acquit and discharge the respondent and uphold the principle that it is better to acquit ten guilty E people than convict one innocent person.

The Appeal

[18] Before us, the learned Deputy Public Prosecutor ("DPP") raised the issue of knowledge and submitted that the trial judge had failed to address F his mind to the inconsistency between the respondent's cautioned statement and her oral testimony.

[19] In the cautioned statement, the respondent had stated that she had put the plastic bag containing the drugs inside her bag when she heard the knocking on the door. In her oral testimony, she said that she had put the G plastic bag into her bag because she wanted to clean up her room since the second accused was coming.

[20] Learned DPP submitted that the respondent's attempt at changing her cautioned statement has decreased the evidentiary value of the statement (*Kumaran Sappani v. PP* [2011] 3 CLJ 251). Learned defence counsel H submitted that the prosecution relied too much on the words in the cautioned statement but the trial judge had accepted her explanation.

Our Decision

[21] The prosecution evidence show that the bag containing the drugs was I found inside the respondent's bag concealed from view. The respondent had admitted putting the drugs in her bag. The respondent was the sole tenant of the room. Nobody else had the key to the room. Therefore at the material time the respondent had actual possession, custody and control of the bag

exh. P67. The concealment of the bag supports the inference of knowledge of the contents of the bag. Based on the quantity and weight of the drugs, His Lordship had rightly invoked the presumption under s. 37(da) of the Act. We find that the trial judge had correctly ordered the respondent to enter her defence.

[22] In her defence, the respondent denied knowledge of the drugs. She testified that she had placed the bag of drugs into her bag when her boyfriend informed her that he was coming. According to her, she had made a mistake in her cautioned statement.

[23] We agree with the DPP that there was an apparent inconsistency between the respondent's cautioned statement and her oral testimony, regarding her explanation as to when she put the bag of drugs inside her bag. The trial judge accepted the respondent's oral explanation and found that the respondent had raised a doubt on the ingredient of knowledge. However, His Lordship gave no reason why he preferred the oral explanation over the cautioned statement. In the circumstances, it is necessary to peruse the respondent's testimony relating to the cautioned statement.

[24] In examination-in-chief, this was what she had stated (pp. 153 to 154 appeal record):

S: I am referring to D76. Is that your caution statement can you see in the file, D76? Is that the caution statement that you gave to one Insp. Mohd Saiful Rizal?

J: Yes

S: He took down the statement in English?

J: Yes. This is one which I type for him.

S: You type?

J: Yes, I type because he cannot type.

S: You type this caution statement also.

J: Yes

S: Does he give you the question and all that?

J: Yes, she give me the question and then I type the answer.

S: So you type the question and answer lah?

J: Yes

[25] The cautioned statement was recorded on 29 January 2013, ie, approximately three days after her arrest. Given the proximity of time between the date of her arrest and the date when the cautioned statement was recorded, and the fact that the answers in the cautioned statement were typed by the respondent herself, it would be reasonable to expect that her recollection of events on 26 January 2013 as recorded in her cautioned statement would still be fresh in her mind.

[26] We were of the view that the trial judge had failed to properly address his mind to the probability that what the respondent had stated in her cautioned statement may be a true reflection of events that had occurred on 26 January 2013 and, that the explanation that she had given in her testimony was probably an afterthought to suit her defence of no knowledge. Had the trial judge properly addressed his mind to this issue, then His Lordship would have entertained reservations about the credibility of her oral explanation. In our considered opinion, the events as narrated by the respondent in her cautioned statement ought to be preferred compared to her oral explanation. We were of the view that the trial judge had erred in accepting the respondent's oral explanation. We were inclined to accept the version in her cautioned statement, that she put the bag of drugs into her own bag upon hearing the knocking on the door.

[27] The learned DPP had submitted that the respondent is guilty of wilful blindness because the, Lacoste, bag was not sealed and the respondent could have opened it to check the contents, but she chose not do to so.

[28] In the case of *Hoh Bon Tong v. PP* [2010] 5 CLJ 240, this court through the judgment of Abdul Malik Ishak JCA had occasion to state as follows:

> The defence of innocent carrier must necessarily bring into the picture the concept of wilful blindness. And according to Yong Pung How CJ (Singapore) in *Public Prosecutor v. Hla Win* (*supra*) at p. 438, "the concept of wilful blindness qualifies the requirement of knowledge". And his Lordship continued further by saying (at the same page):
>
> > As Professor Glanville Williams aptly remarked in his Textbook on Criminal Law, at p. 125:
> >
> > > … the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise'. To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he doesn't want to know,' he is taken to know'.
>
> Continuing at the same page, His Lordship said:
>
> > In *Ubaka v. PP* [1995] 1 SLR 267, the principles laid down in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in *Tan Ah Tee v. PP* [1978] 1 LNS 193; [1980] 1 MLJ 49 were applied by the trial judge. In its grounds of judgment, this court quoted the following passage by the trial judge:
> >
> > > Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance *simpliciter* is not enough.

[29] According to the respondent, she had received the bag from Khaliun at about noon on 24 January 2013. The next day ie, 25 January 2013 she had met Khailun twice, ie, at 3pm when Khaliun came to collect some Mongolian food from her, and that night when Khaliun came to her room for dinner. Khaliun had stayed for one hour.

[30] The raid took place in the early hours of 26 January 2013. Therefore from the time that the respondent took the bag from Khaliun till the time of raid, the bag had been in the respondent's possession for approximately two days. The respondent had ample opportunity to ask Khaliun about the contents of the bag, yet she did not.

[31] We were of the view that there were sufficient reasons to cause the respondent to be suspicious about the contents of the plastic bag. Firstly, the weight of the bag itself. According to PW1 the chemist, the gross weight of the drugs was 1024.4g. Surely a bag the size of the 'Lacoste' bag containing clothes only would not weigh one kilogram? Secondly, the shape of the contents of the bag. The drugs were packed in the manner as can be seen in photograph number 13 at p. 294 appeal record. Since the layers of bags were made of paper and plastic, the shape of the bag's contents can be felt even without opening the bag. It is reasonable to expect that a bagful of clothes would have felt different from a bag containing substances which were described by the chemist in her report as "bahan ketulan dan serbuk".

[32] Further, the 'Lacoste' bag was a normal shopping bag with no lock or zip (see photograph at p. 295 appeal record). There was no hindrance to visually see its contents. Even a cursory peek into the bag would have enabled the respondent to see that there were plastic bags and no clothes inside. Given all these factors, in our opinion it was improbable that the respondent could not have known that the bag may not contain clothes during the time when the bag was in her possession. A reasonable person's suspicions would have been aroused that the bag may not contain clothes. It was mere folly on her part not to examine the bag. Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance *simpliciter* is not enough. (See *Ubaka v. PP* [1995] 1 SLR 267 at p. 273). We agree with the DPP that the respondent is guilty of wilful blindness.

[33] As for the person named Khaliun, in cross examination PW3 had stated that no particulars of Khaliun was given by the respondent in her cautioned statement. PW3 agreed that earlier on the same night of the respondent's arrest, there was a Mongolian named Khaliun who had been arrested elsewhere for drug trafficking activities. Since Khaliun was mentioned by the respondent in her cautioned statement, PW3 did make inquiries. Her inquiries showed that this person denied any knowledge about the drugs in the respondent's case. In cross examination, PW3 stated as follows (pp. 66 to 67 appeal record):

S: Makna apa yang kamu diberitahu sebenarnya kamu tidak siasat langsung.

J: Saya siasat YA.

S: Macam mana you siasat, tolong beritahu?

J: Saya soal siasat Khaliun itu. Dia tak tahu pasal OKT ini.

Mkh: Kamu ada soal siasat Khaliun?

J: Ada. Dan dia menafikannya.

S: Adakah Khaliun mengaku kepada Insp. Saiful dia ada beri satu bungkusan kepada OKT 1?

J: Saya tak ingat, soal siasat saya dengan Khaliun, dia cakap dia tiada beri apa-apa. Bukan pasal caution.

[34] We were of the view that notwithstanding the allegations made in respect of Khaliun, and even if the person Khaliun was involved in drug related activities, this did not in any way detract from the fact that the respondent had actual possession, custody and control over the drugs at the time of her arrest. The quantity of drugs triggered the presumption of trafficking under s. 37(da) of the Act.

Conclusion

[35] On a totality of the evidence we find that the respondent had failed to raise a reasonable doubt on the prosecution case and had also failed to rebut, on a balance of probabilities, the presumption of trafficking under s. 37(da) of the Act. We find that the balance of evidence was against the acquittal of the respondent. We therefore allowed the appeal and set aside the decision of the High Court. We found the respondent guilty and we convicted her and sentenced her to death.